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No. 08-448

IN THE

Supreme Court of the United States

CABLE NEWS NETWORK, INC., *et al.*,
Petitioners,

v.

CSC HOLDINGS, INC. AND
CABLEVISION SYSTEMS CORP.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR VARIOUS PROFESSORS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

Amici are professors who teach, research, and have an interest in the theory, law, and practice of copyrights, property rights, and contracts. Amici have no other stake in the outcome of this case,[1] but are interested in ensuring that copyright law develops in a way that best promotes creativity, innovation and competition in the digital world. A full list of amici is appended to the signature page. Both petitioner and respondent have consented to the submission of this brief by lodging blanket consents with the Court.

SUMMARY OF ARGUMENT

This case presents several of the most important copyright issues presented to this Court in recent years and has huge significance for the continued development of digital information systems. The decision of the Second Circuit Court of Appeals should be reviewed and reversed.

The decision below addresses copyright protection with respect to the unique ability of digital systems to enable delayed performance of copyrighted content to

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[1] Pursuant to S. Ct. R. 37.6, the amici represent that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amici or their counsel made a monetary contribution to its preparation or submission except that The University of Houston Law Foundation program on Commercial Information Studies paid only the actual printing and filing costs. The parties' general letters of consent to the submission of amicus briefs have been filed with the clerk. Counsel of record for all parties received timely notification of amici's intention to file this brief.

fit times of the customer's own choosing. In the cable television industry, this is referred to as on-demand video. More broadly, it affects many online systems where the commercial service offered to customers is access to or viewing copyrighted content at a time and place of the customer's own choosing.

These systems have created significant and burgeoning new markets for copyrighted works. Determining the proper relationship between copyright law and other interests in these systems will shape these markets and, thus, the future of copyright law. The Court of Appeals' decision holds that the cable on-demand systems can be operated for-profit without obtaining permission from copyright owners. If this becomes law, copyright protection will be excluded from an important means of distribution in digital systems that may become the dominant method of distributing content in the future.

This case deals directly with cable television. But its ramifications extend far beyond this. In its decision, the Court of Appeals ruled on three issues of digital copyright law that affect all digital products, including all software and all Internet operations. These are: when does a copy exist within a computer, who is responsible for automated systems set out to make copies of works, and when is a performance "public" in a digital system that allows each user to view it at a time of their own choosing. It is impossible to overstate the importance of the answers to these issues in determining the future role of copyright in digital systems.

The Court of Appeals' decision should be reviewed because of its importance. The decision should be reversed because it conflicts with existing precedent and with the language and policy of the Copyright Act.

The Court of Appeals erred in creating a standard that absolves the operator of an automated service from responsibility for the copies that its automated system makes. Without statutory basis, it held that a "volitional" element is required, apparently meaning that a person does not make a copy unless that person (or a human employee) is physically involved in the act that yields a copy. In digital information systems, use of software to perform pre-programmed actions clearly involves conduct attributable to the person who deploys the software for the purpose.

The Court of Appeals erred in concluding that there was no public performance of the cable programs when customers subsequently requested and received performance of the copied program because the performance was not "public." The court invented a theory that a performance is not public unless the same copy or transmission can be viewed by multiple people. But the Court of Appeal's interpretation contradicts the plain meaning of the statute.

This Court should review the Court of Appeals' decision and reverse it.

ARGUMENT

I. THIS CASE PRESENTS SEVERAL OF THE MOST IMPORTANT COPYRIGHT ISSUES PRESENTED TO THIS COURT IN RECENT YEARS AND HAS HUGE SIGNIFICANCE FOR THE CONTINUED DEVELOPMENT OF DIGITAL INFORMATION SYSTEMS. REVIEW OF THIS CASE THUS PROVIDES THE COURT WITH A UNIQUE OPPORTUNITY TO GIVE GUIDANCE AND DIRECTION ON FUNDAMENTAL COPYRIGHT LAW ISSUES. IT WOULD ALSO ALLOW THIS COURT TO RESOLVE A SPLIT IN THE CIRCUITS CREATED BY THE LOWER COURT'S DECISION.

Digital information systems, including digital software, digital cable and the digital Internet, have created new ways of distributing copyrighted content, new information services, and new commercial opportunities. *See generally* Raymond T. Nimmer, *Information Law* ch. 1 (1997, 2008 Supp.). As these new distribution methods and new commercial opportunities have continued to arise and the technology has continued to evolve, we have moved far away from traditional methods of mass distribution of copyrighted content, such as sales of tangible copies or use of broadcast technologies as the only means of distribution.

Decisions on copyright law issues applicable to these new means of distribution provide a framework for the new markets they create. The decisions also determine whether copyright owners will have a stake in the new markets or whether copyright will become irrelevant with control transferred to persons and companies other than the creative workers who develop the content. There are fundamental social policy and social structure issues involved in such decisions. Indeed, the modern landscape of copyright law is characterized by a conflict between persons who would retain and support property rights that promote incentives to create,

and persons who would prefer diminishing those rights to enable broad commercial and other use of copyrighted works without compensation to copyright owners.

Copyright law is designed to provide incentives to creative workers to create and distribute their works. *See Harper & Row Publishers, Inc.* v. *Nation Enters.*, 471 U.S. 539, 546 (1985); *Sony Corp. of Am.* v. *Universal City Studios, Inc.*, 464 U.S. 417, 432 (1984). If copyright owners do not have a stake in these new means of distribution and, as is likely, these new systems become more and more important in commerce as digital technology continues to evolve, those incentives to create and distribute are substantially weakened, if not destroyed.

This is a central issue in this case.

A. The Decision Deals With The Role Of Copyright In Systems That Enable Performances Of Copyrighted Works On Demand, Resolving This Allocates Control In Burgeoning Markets For Such Systems Between Copyright Owners And Other Parties, Including Cable Service Companies.

The case deals with copyright law applied to systems that provide content on demand (or, as described in the motion picture and related industries, video on demand). These systems use digital technology to make copyrighted works available to users at a time of the users' own choosing. When applied in a mass market environment, they create the ability to make mass distributions that are customized to individual users by operation of the software and communications systems they employ. *See generally* Stan Davis & Christopher

Meyer, *Blur: The Speed of Change in the Connected Economy* (1998).

If the copyright owner assents to use of its copyrighted work in such systems, they are an incredibly valuable contribution to the digital economy. Indeed, as witnessed by the many new systems evolving in reference to music, text, and digital photos, these on-demand systems may ultimately be the primary mass distribution system used for copyrighted works. *See, e.g., Apple's iTunes Hits 5 Billion Mark*, CNET-News.com, June 19, 2008, *available at* http://news.cnet.com/8301-10784_3-9972528-7.html; Joel Russell, *The Age of Media On-Demand Looks Like It's Close at Hand*, L.A. Bus. J. (May 29, 2006).

Recognizing the importance of this issue internationally, two World Intellectual Property Organization (WIPO) treaties specify that copyright owners control the right to make their content available in this manner. *See* WIPO Copyright Treaty, adopted by the Diplomatic Conference on December 20, 1996, art. 8 ("authors ... shall enjoy the exclusive right of authorizing any communication to the public of their works ... including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them."); WIPO Performances and Phonograms Treaty, adopted by the Diplomatic Conference on December 20, 1996, art. 10.

The United States has ratified both treaties, thus adopting their policy and obligating the United States to adopt the "making available" right in its own law. Pub. L. No. 105-304, 112 Stat. 2861 (1998). Indeed, the Register of Copyrights has stated that the making available position is and has been part of United States

law without the intervention of the Treaty. *WIPO Treaties Implementation Act and Online Copyright Liability Limitation Act: Hearing on H.R. 2281 and H.R. 2180 Before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary* 105th Cong. 43 (1997) (statement of Marybeth Peters, Register of Copyrights).

In this case, however, the Court of Appeals held that the copyright owner has no right to object to, or to seek royalties for, the commercial use of its work in this manner. This decision, if allowed to stand, cedes control of a major form of mass distribution of copyright works to persons other than the copyright owners.

The effect on copyright law and the creative work that it supports could be disastrous. The ability to benefit from markets for copyrighted works lies at the heart of the incentives created by copyright law. To the extent that those are taken away, copyright law's function in promoting the creation and distribution of creative works is diminished. Continued development of digital works at the rapid pace that we have seen in the past three decades is jeopardized.

B. The Decision Deals With Digital Copyright Law Issues That Affect All Internet And Digital Commerce, Including Deciding When A Digital Copy Exists And What Is The Effect Of Use Of Automated Software Systems To Make Copies; It Does So In A Manner Inconsistent With Rulings Of Other Circuits.

Since the mid-1970's to the early 1980's, copyright law has provided the primary property law basis for the creation and enforcement of rights in digital works. During that time, Congress recognized that computer programs were copyrightable works and decisions in

several Court of Appeals cases held that this applied to computer programs and other digital works within computer systems. *See generally Apple Computer, Inc.* v. *Formula Int'l Inc.*, 725 F.2d 521 (9th Cir. 1984); *Apple Computer, Inc.* v. *Franklin Computer Corp.*, 714 F.2d 1240 (3d Cir. 1983); *Stern Elecs., Inc.* v. *Kaufman*, 669 F.2d 852 (2d Cir. 1982); *Williams Elecs., Inc.* v. *Artic Int'l, Inc.*, 685 F.2d 870 (3d Cir. 1982).

This premise has continued into the Internet and other emerging forms of digital processing and distribution. An established body of case law has evolved.

The Court of Appeals decision breaks with existing law and calls into question the scope and applicability of copyright law in several respects. For example:

- It creates a conflict with precedent that copies made within a computer memory are copies for purposes of copyright. *See MAI Sys. Corp.* v. *Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993); *Stenograph L.L.C.* v. *Bossard Assocs., Inc.*, 144 F.3d 96 (D.C. Cir. 1998); *Storage Tech. Corp.* v. *Custom Hardware Eng'g & Consulting, Inc.*, 421 F.3d 1307 (Fed. Cir. 2005).
- It conflicts with other law that establishes that a party using a software agent to automate a commercial result is responsible for the actions of that software. *See generally* 15 U.S.C. § 7001 (2000); Uniform Computer Information Transactions Act §§ 107, 112 (2002). Digital systems enable entities to automate functions previously performed by human beings. In these systems, electronic agents act on behalf of their client and implement high speed processing of digital files, making decisions based on program instructions. The adoption and use

of such systems binds the company doing so to their results. The Court of Appeals, however, created a voluntary human act requirement, immunizing automated systems from direct infringement claims.

These are important decisions affecting digital copyright law generally and will reverberate far beyond the arena of on-demand content. This Court should review the Court of Appeals' decision.

II. The Decision Of The Court Of Appeals Should Be Reviewed Because Of Its Importance. The Court's Rulings Should Be Reversed Because They Conflict With Existing Precedent And With The Language And Policy Of The Copyright Act.

The Court of Appeals' decision adopts a narrow view of copyright law applicable to digital information systems that conflicts with decisions of other courts and with the language of the statute, and that does so in a manner that substantially undermines copyright protection for digital content. Unless reversed, the decision may shape an important part of that market in a manner contrary to copyright law and policy and detrimental to the role of copyright in supporting the creation and distribution of creative works.

A. The Court Of Appeals Erred In Holding That A Defendant Is Not Responsible For Making The Copies That Its Automated Computer System Created.

Modern digital systems frequently use software to automate functions once performed by human actors. Indeed, software-based automation is a hallmark of the digital economy.

Cablevision deployed and sold subscriptions for an automated system that caused unauthorized copies and performances of copyrighted works, but the Court of Appeals held that Cablevision was not responsible for the copies that its system created. Instead, the court held that a "volitional" element is required, apparently holding that a person does not make a copy unless that person (or an employee) is physically involved in the act that creates a copy. This standard does not exist in the Copyright Act and, in the digital information age, creating such a requirement would create a huge gap in copyright protection.

The parties and the court below agree that copies were made when a requested program was transferred to more permanent storage for later access by the customer. Not surprisingly, the selection and copying was provided in part by software deployed by Cablevision to automate the process for the thousands of users that the system attracts. But the Court of Appeals held that Cablevision had no liability for these copies because the copies were made by the customer.

The court relied on a District Court decision in *Religious Technology Center* v. *Netcom On-Line Communication Services, Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995), which it interpreted as establishing a "voluntary act" element in direct infringement requiring that a human being be involved in causing a copy to occur. But Netcom, a case involving a general purpose server that received and transmitted numerous, unscreened digital files, is readily distinguishable from this case where subscribers paid for the privilege of having Cablevision's system copy and provide content for their later viewing. In this instant case, no human employee pushed a button causing the copies to occur, but the company acted through its electronic agents, software

systems programmed to respond to customer requests. The business model in which a clerk sits behind a window and responds to customer requests does not exist in modern commerce where programs, automated answering services, and other types of automation provide the interaction with customers.

The Copyright Act does not specify that there must be a human actor involved for that person (or the employer) to be responsible for making a copy. In a digital information world in which sophisticated software is relied on to seek out and reproduce content, a requirement that a human act occur is inappropriate and would expose copyright owners to potentially widespread piracy by the mere artifact of using software surrogates.

The fact that a company or individual should be held responsible for the actions of software agents it has selected and deployed for the particular purpose is recognized in other areas of law. *See generally* 15 U.S.C. § 7001 (2000); Uniform Electronic Transactions Act § 14(1) (1999); Uniform Computer Information Transactions Act §§ 107, 112 (2002). It must be recognized in copyright law.

The proper analogy here is to an automated copy center, where an individual brings a book and asks the copy center to make a copy of it. If a human employee makes the copy, the employer is responsible. Just so, where the company deploys a computer program to respond to thousands of customer requests and cause copies to be made. The use of software to perform preprogrammed acts involves voluntary conduct by the software user—in establishing the software, setting it out for a particular purpose, and relying on it for a profit. If this does not suffice, copyright protection is hugely diminished and commercial entities can exploit

works copyrighted by others merely by using software to automate their otherwise infringing business plans.

B. The Lower Court Erred In Holding That There Was No "Public" Performance Of Cable Programs When Thousands Of Customers Viewed Delayed Performances Using Cablevision's System.

The Copyright Act gives the copyright owner the exclusive right to publicly perform or display the copyrighted work. 17 U.S.C. § 106. The cable television works here were performed to thousands of customers when the customers who had requested Cablevision to make copies subsequently viewed those copies. The Court of Appeals concluded that these performances were not "public" and therefore not covered by copyright law.

This cannot be correct. The court invented a theory that a performance is not public unless the same copy or same transmission can be viewed by multiple people. But the copyright act does not so provide. The Court of Appeals' interpretation contradicts the plain meaning of the statute. The statute provides:

> To perform or display a work "publicly" means ... to transmit or otherwise communicate a performance or display of the work ... to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display *receive it in the same place or in separate places and at the same time or at different times.*

17 U.S.C. § 101 (emphasis provided). The court argued that this was not met because each individual customer was the only person who could view the particular copy

that it created. But it is quite clear that Cablevision offered delayed performances to the public (its entire customer base) and transmitted the performance via its RS-DVR system. According to the Court of Appeals, each of these were private performances. But that wrongly ignores the system as a whole.

What is at stake is what is the role of copyright in commercial environments where digital technology enables offering works to the public under a selective distribution system, rather than by broadcast. The Copyright Act seemingly answers this—a public performance occurs even if the members of the public view it at different places and different time. That standard gives control of public performances to the person truly entitled to it—the copyright owner. The Court of Appeals' answer snatches this away and hands control to cable companies and others.

This Court should restore the balance set out in the statute: a public performance occurs when a digital or other system makes available to the public a performance of the work, even if that performance is experienced by each of those who choose to watch or experience it at different times.

CONCLUSION

The petition for writ of certiorari should be granted and the Court of Appeals' decision should be reversed.

Respectfully submitted.

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APPENDIX

APPENDIX—LIST OF AMICI

Bruce E. Boyden is an Assistant Professor of Law at Marquette University Law School, where he teaches intellectual property and internet law. He has extensive experience in information technology issues, including copyright, digital rights management, privacy law, e-commerce, domain names, and computer trespass. Prior to becoming a professor, he was an attorney with Proskauer Rose LLP for eight years.

Jay Dougherty is a professor at Loyola Law School in Los Angeles, where he teaches courses in copyright law. He was an adjunct professor for ten years at the University of Southern California Law Center and has extensive copyright experience from years of working at leading entertainment law firms and in high-level positions for motion picture studios and production companies. Prof. Dougherty is past President of the Los Angeles Copyright Society and co-editor in chief of the Journal of the Copyright Society of the U.S.A.

Shubha Ghosh is a Professor of Law at The University of Wisconsin Law School and Associate Director at INSITE. His scholarship and teaching are in the areas of intellectual property theory and policy, competition policy, legal theory, and institutional analysis of markets and legal institutions. Professor Ghosh has published over fifty scholarly articles, book chapters, books, and commentaries, and he is the co-author of two legal casebooks: *Intellectual Property in Business Organizations* and *Intellectual Property: Private Rights, Public Interest, and The Regulation of Creative Activity*.

Stan Liebowitz is the Ashbel Smith professor of economics and Director of the Center for the Analysis of Property Rights and Innovation at the School of Management at the University of Texas at Dallas. He has written five books and numerous articles, among them the first article (in 1985) suggesting conditions under which unauthorized copying might be beneficial to copyright owners. He gave the inaugural keynote address to the Society for Economic Research on Copyright Issues in 2002, and served as its president in 2006-2008. His research has been the focus of stories in numerous outlets including The Economist, The Wall Street Journal, The New York Times, The Financial Times, and a program on the BBC.

Robert Merges is the Wilson Sonsini Goodrich & Rosati Professor of Law and Technology at the University of California at Berkeley (Boalt Hall) and Director of the Berkeley Center for Law & Technology. Merges has authored or co-authored three books, *Patent Law and Policy: Cases and Materials*, *Intellectual Property in the New Technological Age*, and *Legal Protection for Computer Technology*. In addition to teaching and research projects, Merges also serves as a special consultant to the U.S. Department of Justice, Antitrust Division, and is a member of the Department's Task Force on Intellectual Property.

Raymond Nimmer is Dean, the Leonard Childs Professor of Law and the director of the Intellectual Property and Information Law Institute at University of Houston Law Center. Professor Nimmer is the author of over twenty books and numerous articles. His books include the treatises *The Law of Computer Technology*, *Information Law*, and *The Law of Commercial Electronic Transactions* and he is a member of

the advisory board of various publications, including The Internet Lawyer and Internet Law & Regulation.

Lionel S. Sobel is a professor of law at Southwestern Law School and the Chair of the ABA Forum Committee on the Entertainment and Sports Industries. The publisher and editor for over 25 years of the Entertainment Law Reporter, Professor Sobel is also the author of texts on the law and business of the entertainment and sports industries. He has testified on issues ranging from antitrust laws in major league baseball to international licensing practices in the motion picture, music and computer software industries before the U.S. House of Representatives, California Senate, California Assembly, and U.S. Tax Court.

Rodney Smolla is Dean and Roy L. Steinheimer, Jr. Professor of Law at Washington and Lee University School of Law. He is the author of several books, including *Free Speech in an Open Society*, which won the 1992 William O. Douglas Prize. He regularly speaks and writes on issues involving the First Amendment and intellectual property law.